Supreme Court of the United States

OCTOBER TERM, 1963.

No. 79

2872.88 ACRES OF LAND, ETC., ET AL.,
Petitioners,

versus

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioners present its petition for a rehearing of the above entitled cause, and, in support thereof respectfully show:

GROUNDS FOR REHEARING.

A. The Opinion Of This Court Fails To Apply Recognized Principle Of Law To The Facts Of The Case, Which, If Applied, Requires A Different Decision From That Rendered.

Petitioners file this Motion for Rehearing reluctantly, and do so only because they humbly but firmly believe

that this Court overlooked applying the recognized requirement of specificity of objections to a master's report in order to preserve a question for review.

The opinion reads:

> "Moreover, the litigants have a responsibility to assist the process by specifying their objections to instructions, by offering alternate ones, and by making their timely objections to the report in specific, rather than in generalized form, as required by equity practice. See *Sheffield & Birmingham R. Co. v. Gordon, 151 U.S. 285, 290, 291.*"

To same effect: *U.S. v. Lewis (9th Cir. 1962) 308F 453, at 456.*

The opinion is silent as to application of this requirement of specific objections to the instructions to the commission, or to commission's reports. The failure to apply this recognized principle lies at the root of the error of the decision of this Court.

To specify is literally to lay the finger upon the point. Petitioners respectfully suggest that the objections in Case 79 to the reports are not of the required specificity. The opinion does not so hold. If they were of the required specific nature, it should be so held. If they are not of the required specificity, then it follows that the trial judge cannot be put in error for overruling them. Particularly is this conclusion demanded where Respondent did not contend that the awards were excessive in its points upon which it relied on appeal. The decision overlooks the lack

of specific objections by Respondent and then requires the most exacting instructions by a trial judge, and a fully detailed report, all without specific objections by the appealing party.

Likewise, it is respectfully suggested that if this Court does not see fit to grant this rehearing applied for, then it should specify precisely what "more" in 1-2-3 fashion the District Court should have done, or what additional findings it or the Commission should now make in order to constitute compliance with this Court's decision.

B. Instructions Given In Case 79 Substantially Complied With The Guidelines Stated In This Court's Opinion.

As to Case 79 there were no objections to the instructions by the Trial Court to the Commissions. The opinion recognizes the adequacy of these instructions as to the law. Page 5 of the opinion. The Trial Court instructed the Commission as to the comparative weight of "expert" opinion and other opinion evidence (R. 24), as to both opinion evidence and comparable sales being competent evidence of value (R. 24), and as to the best evidence of value by necessary implication. It defined "just compensation" as "fair market value" and then defined fair market value as the price which a willing purchaser would pay a willing seller as of the date of taking, (R. 22-23) which could mean only that truly comparable sales prior to or after but not remote from the date of taking (R. 24) is the best evidence of value. The Trial Court did not give ex-

amples of severance damage, but he defined it in simple terms that no reasonably intelligent layman or lawyer could misunderstand. (R. 22.) *It is hardly necessary to illustrate that which is readily understandable.* The Trial Court instructed the Commission as to the manner of conducting the hearing. (R. 19, 22, 25.). It also instructed the Commission as to the view of the property and the limited purpose of it. (R. 25.) It did not instruct the jury as to the kind of evidence inadmissible nor the manner of ruling on it. It contemplated that the chairman of the Commission, "an experienced attorney" would rule upon the admissibility of evidence. (R. 25.) It would be virtually impossible for a trial judge to anticipate the evidence that would be introduced by the parties, and instruct the Commission specifically on how to rule on such evidence. The further instruction that if some unanticipated problem should arise the Commission should ask the Court for additional instructions (R. 26) left the Commission free to consult with the Court as to any unusual problem or question which might arise.

The cases were tried in the United States Court Room. (R. 32, 41, 89.) Pretrials were had. (R. 29.) The views of the lands were made with representatives of both parties present. A complete transcript of the proceedings was before the trial court. The cases were tried by the same rules and in accord with the same decorum and requirements of due process, objections to evidence and rulings thereon and the trials were the equivalent of any trial before the trial judge himself. Counsel for Petitioners know this to be a

fact from personal experience. There is not the slightest suggestion to the contrary in the record.

In view of the above, Petitioners respectfully submit that the awards should not be set aside for any inadequacy in the instructions, particularly since no exceptions were taken thereto. The analogy of Rule 51 compels this conclusion.

C. Opinion Is Inconsistent Within Itself As To Interpretation Of Rules 52 And 53.

The Trial Court instructed the Commission to file a written report setting forth the findings of fact and conclusions of law and the amount of just compensation. (R. 26.) Rule 53 only requires a report *if required* by the order of reference. A "conclusory finding" would have been only a statement of the amount of just compensation awarded. To label the findings of fact in the instant cases as conclusory findings overlooks the findings of (1) highest and best use, (2) the value of lands taken in fee, (3) value of flowage easements and (4) severance damage.

The Court's opinion states that the instructions as to the report in the instant case are inadequate because the Commission was not expressly directed to state (1) the reasoning or the process they used in deciding an award, (2) what standard they try to follow, (3) which line of testimony they adopt, (4) what measure of severance damages they use and (5) and so on. Opinion, Pages 6-7.

Reasoning upon evidence is not fact finding. Interstate Circuit, Inc. v. United States, 304 U.S. 55, Petterson Lighterage & Towing Corp. v. New York Central R. Co. (2nd, 1942) 126 F' 992, Lange v. Liberty National Insurance Company, (9th Cir. 1963) 324 F' 237 (2), at 241.

Even without such instructions the Commission stated the standard they applied, namely, fair market value complying with (2) above. As to (3), they did not expressly state what line of testimony they adopted, but it is obvious that they rejected the Respondent's line, and formulated their own independent findings after considering all of the evidence, which more nearly approximated the landowner's line. As to (4) they did not state expressly what measure of severance damage they used, but they did state the basis therefor. (R. 28, at approximately $31.00 per acre for 502 acres, R. 48, at approximately $50.00 per acre for 70 acres, and R. 97, at approximately $22.40 per acre for approximately 200 acres.) The measure of severance damage is exactly what the name implies and what the trial judge instructed the Commission, and could only be the difference in the fair market value before and after the taking. As to "and so on" Petitioners suggest that this connotes nothing specific.

The really new innovation which the opinion introduces into Rule 53 is the requirement of the statement of the process by which the Commission reached the award, or the path which the Commission chose to follow through the maze of conflicting evidence.

This in essence calls for reasoning upon the evidence which is not required under Rule 52 by a judge trying a nonjury case. Yet the opinion states that the Commissioners "need not make the detailed findings such as judges do who try a case without a jury". Opinion, Page 6. The inconsistency in the opinion is patent. First, the opinion states that a master need *not* make detailed findings as a judge is required to do, and then, in the same paragraph, nevertheless concludes that a master must state the process of decision or the reasoning upon the evidence, *which a judge is not required to do under Rule 52.* This requirement of the statement of the process of decision is essentially a statement of the process of what evidence was credited and discredited. With the introduction of this new interpretation of Rule 53, Petitioners respectfully suggest that the opinion, if literally applied, as the lower courts must apply it, has laid to rest both Rules 53 and 71 A(h), insofar as practical use. We fearfully predict that the opinion may well become the beginning of the practical demise of these rules. The most skillful trial judge will find it exceedingly difficult to instruct a commission adequately, and no commission will be able to comply with the detail required. We respectfully suggest that there are no words in Rules 52 and 53 which call for such a difference in findings. Indeed, Rule 52, in stating that the findings of a master, to the extent that the Court adopts them shall be considered the findings of the Court", necessarily contemplates identical requirements as to factfinding.

The opinion states that it writes upon a clean slate. Only if the Court overlooks its prior holdings in the

cases of *Kelley v. Everglades Drainage District, 319 U.S.* 45 holding that the nature and sufficiency of findings are for the trial judge to determine in the first instance, and the case of *Interstate Circuit, Inc. vs. U.S., 304 U.S.* 55 holding that reasoning upon the evidence is not fact-finding under Rule 52, and by holding that findings of fact under Rule 52 means one thing and still another under Rule 53 is there a clean slate to write upon.

D. Opinion Cites U. S. vs. Lewis, 308 F² 453; At 458 and 456, Approvingly (Pages 6 and 7 Of Opinion) But Lewis Case Decision Is Basically Contrary To This Court's Opinion.

The Lewis Case, Page 458, dealt with a conflict in evidence as to highest and best use (whether for ranching or gravel deposit) and the Court held that it "must know what the highest and best use of the property is and whether and how the gravel deposit figured in the values found." Id., Page 358. The objections to the report in that case protested the "use value approach" rather than "fair market value". The reports in the instant cases, expressly recited the fair market value was the standard used by the Commissioners and in addition there was no conflict in the evidence as to highest and best use as there appeared in the *Lewis* case and the case of *U. S. v. Carroll, (4th Cir. 1962), 304 F² 300 (horse farm vs. marketable sod).*

Again the opinion of this Court refers to Page 456 as sustaining the requirement that the process by which the Commissioners reached their award be

stated explicitly. There is no language on this page of the *Lewis* opinion which supports this position. As against a contention that no findings of fact are required by Rule 53 and 71 A-h, the Court in the *Lewis* Case disagreed and held:

> "There must at least be resolution of factual disputes as to the character of the property, its highest and best use and the elements which contribute to its value; and disputes as to applicable principles of valuation." Id., p. 456.

Petitioners note in passing that the *Lewis* decision (p. 456) recognizes and applies the requirement of specific objections to a report as of controlling significance, even as the opinion of this Court recognizes on Page 7 of the opinion, citing the *Sheffield* case, *supra*, as authority, but fails to apply it to the facts of the cases *sub judice*.

Petitioners respectfully suggest that this Court *must* have overlooked the language of the *Lewis* case, (*Benning* and *Morrison* Cases) *supra*, at Page 460, which reads as follows:

> "(7) The objections of the United States in these cases seem to be directed to the fact that the findings and report do not disclose *what proof the commission relied on and why the commission chose to believe certain witnesses and accept certain evidence as more credible than other witnesses and other evidence.* Findings need not be so comprehensive. They should, as the United States asserts, show 'how' material factual disputes relating to value have been

resolved. But this requirement relates to a showing of the result—the fact as found—and not to a detailed itemization of the proof relied upon in order to reach that result. We conclude that the findings and report in each case are sufficient." Id., p. 460 (Italics ours.)

This language not only does not require Commissioners to state the process of decision; it stands opposed to the holding of this Court's opinion in this respect:

E. Opinion Erroneously Holds That Determination Of Fair Market Value Is A Process, Since The Commission Must State The Process By Which It Arrives At An Award.

This Court had previously held that the determination of just compensation was a matter of opinion and also "at best, a guess by informed persons". *U. S. vs. Miller, 317 U. S. 369, 375.* It previously had held that the judicial determination of an award cannot be made by mechanical or mathematical processes, nor can the process of adjudication be governed by a fixed formula. *U. S. v. Cors, 337 U. S. 325.*

Now, however, the Commission must arrive at it by a *process* since they must state the process. Actually the process, if it can be labeled such, is at most a compromise between conflicting opinions and that involves credibility pure and simple. We submit that credibility is not something which can be reduced to a stated process, and further that fact finding does not contemplate such.

F. Opinion Overlooks Principles That (1) District Court's Findings Of Fact Should Be Construed Liberally And Found To Be In Consonance With The Judgment So Long As That Judgment Is Supported By Evidence In The Record And (2) All Presumptions Are In Favor Of The Trial Court's Judgment.

Prior to this Court's sanction of the decision of the Fifth Circuit, the captioned principle had been uniformly recognized as fundamental law. The effect of the decision is to abrogate this fundamental principle. Petitioners suggest that the Court overlooked the following cases in reaching its decision.

> "1. Federal Civil Procedure, 2296: Findings are to be construed liberally in support of a judgment or order.
>
> 2. Federal Civil Procedure, 2296: Where, from facts found, other facts may be inferred which will support judgment, such inferences will be deemed to have been drawn."
>
> *Triangle Conduit & Cable Co. v. Federal Trade Commission, (7th, 1948) 168 F. 175 (1) & (2),* affirmed sub nom *Clayton Mark & Co. v. Federal Trade Commission, 336 U.S. 956 (1949).*
>
> "2. Federal Civil Procedure, 2296: Finding of fact of federal District Court should be construed liberally and found to be in consonance with judgment, so long as judgment is supported by evidence in record.

3. Federal Civil Procedure, 2296: Whenever, from facts found by federal District Court, other facts may be inferred, which will support judgment, such inferences will be deemed to have been drawn.

4. Federal Civil Procedure, 2283, 2284: Findings required by statute need not be in haec verba in order to support judgment of federal District Court, and ultimate test as to their adequacy is whether they are sufficiently comprehensive and pertinent to issues to provide basis for decision."

Zimmerman v. Montour Railroad Company, (3rd, 1961) 296 F. 97 (2) (3) (4).

"1. Federal Civil Procedure, 2296: District court's findings of fact should be construed liberally and found to be in consonance with judgment, so long as that judgment is supported by evidence in record."

Blumenthal v. United States, 306 U.S. 16 (1) (3rd, 1962).

To same effect: 5 Moores Federal Practice 2661, Sec. 52.06.

Application of this rule of law would have required reinstatement of the District Court's judgment.

G. Opinion Overlooks Principle That Factfinder Is Not Bound To Follow The Expert.

On Page 4 of the opinion the Court states that the Commission allowed $15,785 as severance damage without explanation. This statement overlooks Findings of Fact numbered 2 and 4 (R. 38), and the testimony

of the Landowner (R. 34). The Landowner testified to $65.00 per acre severance damage, and other witnesses testified to $45.00 per acre, and $70.00 per acre (R. 34, 35). The opinion assumes that the finding of severance damage is erroneous because Landowner's expert only attributed $12,435 to severance damage to the remainder.

Likewise, it states that in the second report the Commission awarded the Landowner $52,950, a sum in excess of opinion of Landowner's expert of the value of the entire property. The same criticism is lodged against the report in the third case.

This is no basis for criticism of the reports if the opinion had followed previous rulings of this Court and other Courts. We submit that the Court overlooked such prior holdings as the following:

> "Opinions of experts as to value of gas leases are, at most, of evidential value and not of such conclusive force that refusal to follow them constitutes error, whether such evidence is addressed to a jury, judge, or statutory board.'"
>
> *Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620 (6).*

> "Failure to follow advice of experts is neither per se denial of constitutional rights nor even error which may be corrected on direct review in either a military or civil case."
>
> *Williams v. Heritage, (5th Cir. 1963) 323 F2d 731 (4).*

Further, the opinion charges that the Commission awarded $3,500 as severance damage in the second report though the highest estimate was $1,275. This is inaccurate. Landowner testified to an average value of the land excluding improvements of approximately $154.00 per acre and a value of $40.00 per acre after the taking, leaving a severance damage of $7,980.00.

CONCLUSION.

It would have been an easier course to follow not to have filed this motion. Only a sincere desire to point out the inconsistencies and the effect of this decision impelled Petitioners to file it. The effort has been made, and in this respect, the lawyer's duty both to his client and to the Court, has been performed. Nothing else really matters, save the sanctity of the law and the workability of the Rules.

WHEREFORE, Petitioners pray that a rehearing be granted and that the judgment of the District Court be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, FORREST L. CHAMPION, JR., one of the attorneys for Petitioners in the foregoing cases, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1964, I served copies of the foregoing Petition for Rehearing for the Petitioners to the United States Supreme Court on the United States of America, Respondent, as follows:

By mailing a copy thereof in a duly addressed envelope with adequate postage prepaid to the following named parties at the addresses set forth below:

Mr. Ramsey Clark,
Assistant Attorney General,
Washington, D. C.,

Messrs. Roger P. Marquis and Hugh Nugent,
Attorneys, Department of Justice,
Washington, D. C.,

Mr. Floyd M. Burford,
United States Attorney,
Macon, Georgia

and by mailing a copy of the same in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

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